NO. 83-18

In The
Supreme Court of the United States
October Term, 1983

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DUN & BRADSTREET, INC.,
Petitioner,
vs.
GREENMOSS BUILDERS, INC.,
Respondent.

—o—

On Writ of Certiorari to the Supreme Court of the State of Vermont

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BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Respondent, Greenmoss Builders, Inc., believes that the question presented for review is:

I. Whether a state regulatory system that vigorously protects the target of false and misleading commercial speech from false factual statements made about its financial condition is constitutionally appropriate under *Gertz v. Robert Welch, Inc.*

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STATEMENT OF THE CASE

1. The Facts

Respondent, Greenmoss Builders, Inc., (hereinafter Greenmoss)[1] is a moderately sized building contractor in

[1]Greenmoss Builders, Inc., is a Vermont corporation with no parent companies, subsidiaries or affiliates.

central Vermont. Reputation is important to Greenmoss since the overwhelming portion of its business has come from referrals.

Prior to Greenmoss' involvement with Dun & Bradstreet (hereinafter D & B), it never experienced economic difficulties and its business was on a steady upward climb. (Tr. 27-29)[2]

Greenmoss learned about the false report of its bankruptcy, circulated by D & B on July 26, 1976, in a most startling fashion. Greenmoss' president was at a local bank to discuss an additional line of credit for a new development. Greenmoss and the bank had a very favorable business relationship prior to D & B's publication of the bankruptcy report. (Tr. 40-44). As Greenmoss' President discussed the loan request, the bank officer handed him a D & B "Special Notice" declaring that Greenmoss had filed a voluntary bankruptcy petition. This was a false statement of fact. The report also grossly understated Greenmoss' assets and liabilities. The bank suspended action on the loan request until the matter of Greenmoss' status could be cleared up. (Tr. 54). The Bank was a subscriber to D & B's credit reporting service.

There then commenced a series of contacts between Greenmoss and D & B which prompted Greenmoss' claim at trial that D & B engaged in persistent, oppressive and outrageous conduct. After locating the D & B regional office responsible for the publication, Greenmoss' President spoke with a D & B representative who was not willing to accept Greenmoss' denial of the bankruptcy report

[2]"Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

and continually refused to divulge who had received the falsehoods. (Tr. 57-60). Greenmoss was repeatedly frustrated in its efforts to obtain this information. It was not until litigation ensued and formal discovery requests were submitted that the scope of the circulation of the false bankruptcy report was revealed. Thus, Greenmoss found itself in the untenable position of knowing that false notices of its bankruptcy had been circulated but was unable to obtain information about the breadth of the defamation.

The next series of communications Greenmoss had with D & B were equally unsatisfactory. About eight days after the bankruptcy notice, Greenmoss received a call from D & B advising that it had "confirmed" the falsity of the bankruptcy report and a so-called corrective notice was read.[3]

Greenmoss was most upset about the language of the so-called corrective notice, believing it to be almost as damaging as the bankruptcy notice. Greenmoss complained that the notice was inadequate and misleading in numerous respects and requested that it not be sent in that form. Notwithstanding Greenmoss' objections, the notice was sent in the form chosen by D & B. The so-called corrective notice stated in part that Greenmoss continued operations "as previously reported" which Greenmoss felt was very misleading in view of the gross inaccuracies in the assets

[3]In its statement of the case, D & B asserts that it was not until August 3, 1976 that Greenmoss' President contacted D & B to advise it that the bankruptcy notice was in error and on the same date D & B issued a retraction. This does not square with the testimony in the case which was that Greenmoss called D & B in late July, 1976 and was told that D & B would "look into it". (Tr. 42-43, 54-55, 57-58, 65-68).

and liabilities reported in the false bankruptcy notice and the lack of a clear reference to what previous reports D & B was referring to. The bankruptcy notice had changed Greenmoss' rating to one that signified it had discontinued operations.

D & B did not retain fidelity to its own "corrective notice" since reports subsequent thereto changed Greenmoss' rating to a "blank rating" which meant that circumstances existed *at Greenmoss* that were difficult to classify under the D & B system (Tr. 382). The evidence was that circumstances had not changed at Greenmoss prior to these reports and that D & B had done no investigation prior to their publication. Prior to the bankruptcy notice, Greenmoss' D & B ratings had steadily improved.

D & B had established rules and procedures for verifying the truth of its information prior to publication which its own witnesses admitted were totally and completely ignored in Greenmoss' case. Morever, D & B had data on Greenmoss prior to its decision to publish the bankruptcy report which served as notice that there was a high probability of falsity in the bankruptcy report made by D & B's Vermont correspondent.

Prior to the Greenmoss/D & B difficulties, the Clerk of the U.S. District Court in Burlington, Vermont, had been employed by D & B as its bankruptcy correspondent. (Tr. 261-267). The Clerk became concerned about a potential conflict of interest, informed D & B that he was resigning and suggested his own replacement; a sixteen-year-old high school junior whom the Clerk knew because she had mowed his lawn and done maintenance work around the house. (Tr. 268). She had never had an office job before and knew nothing about bankruptcy.

Without being interviewed by anyone at D & B, this youngster was hired at $200 per year to replace the Clerk. D & B had no knowledge whether the Clerk instructed her about the job, what that training was, if any, and never made inquiry about her performance. There were never any job duties which emanated from D & B concerning her responsibilities. The evidence revealed numerous discrepancies between the bankruptcy petition the correspondent erroneously reviewed and the report she filed with D & B.

After the unsatisfactory dialogue with D & B concerning the corrective notice, Greenmoss, knowing that D & B personnel periodically called seeking information, instructed its employees and office personnel not to discuss the condition of the company with any D & B representatives. In subsequent reports, D & B circulated information that the Secretary (capital S) of Greenmoss "deferred financial information." In fact, this person was Greenmoss' receptionist who knew nothing about the company's condition and had been told not to discuss such matters. D & B persisted in such conduct. For example, Greenmoss requested a caveat in any D & B reports pointing out that, because of the defamation, Greenmoss had decided not to disclose its present financial condition to D & B. (Tr. 197). D & B refused to insert such curative language and in the next report following this request, cryptically reported "the secretary/treasurer of Greenmoss declined financial information". (Tr. 495-96). All of the information concerning D & B's change in Greenmoss' rating and its alleged deferrals and declinations to provide information were circulated to D & B's subscribers who requested information of Greenmoss.

Although D & B excerpts, out of context, segments of testimony on the quantum of compensatory damages, this issue is not before the Court. Beyond that, the trial Court, both after the trial and after the decision of the Vermont Supreme Court from which this Petition is taken, denied D & B's motions for judgment *NOV*. In addition, the Vermont Supreme Court upheld the Trial Court's post-trial rulings on the damage issue, ruling that D & B failed to preserve by appropriate motions at trial all questions based on the evidentiary support for the verdict.[4] Third, D & B, post trial, expressed no desire for relief based on remittitur.

Although the factual sufficiency for the claim that the bankruptcy notice affected Greenmoss' relationship with its bank is not before this Court, the evidence was that the bankruptcy notice came from D & B directly to the main branch of the Bank, that the loan officers who ultimately rejected Greenmoss' loan request (and, in addition, suggested that Greenmoss find another bank to do business with) were officers at the main branch whom D & B chose not to call as witnesses and the loan officer at the local branch could not say whether or not the loan officers who actually made the decision on Greenmoss' future banking relationship had seen the bankruptcy report. Greenmoss vigorously challenged the credibility of the local branch

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[4]In footnote 6 of D & B's Brief, it is asserted that "there is no record support for the statement of the Vermont Supreme Court that 'the bank put off any future consideration of credit to Plaintiff until the discrepancy was cleared up.' (J.A. 34-35)". Contrary to D & B's representation, Greenmoss' President testified twice that bank officials told him they would "not be going any further until this (the bankruptcy notice) was straightened out" (Tr. 54).

loan officer. The bank's decision to terminate not only the request for additional credit but also all banking relationships with Greenmoss, after having done business since 1973, came approximately two months after the publication of the bankruptcy notice. Additionally, Greenmoss introduced evidence that the bank it subsequently was able to establish a relationship with had no knowledge of D & B's reports.

2. The Proceedings Below

D & B's answer and affirmative defenses to Greenmoss' suit together with its pre-verdict memoranda bear close scrutiny since they reveal the theory upon which the case was presented to the trial court and the opportunities which D & B gave the trial court to frame the jury instructions to which it now claims entitlement. No constitutional parameters were asserted before trial. D & B's prime defense was that the defamatory statements were entitled to a common law commercial credit reporting privilege. This was an issue without precedent in Vermot.

Prior to the verdict, D & B never asserted the First and Fourteenth Amendments to the U.S. Constitution nor the extension of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as an *independent or separate* basis for protection nor did it claim entitlement to *both Gertz* and the common law privilege. To persuade the trial judge to formulate jury instructions in accordance with a common law defamation privilege, D & B contended that the issue it now asserts as its only avenue to avoid the verdict was a "second rationale" which it said "underlies *some* court's decisions in favor *of the creation of this qualified privilege.*" (D & B's Memorandum of Law Concerning Exisitence and

Nature of Qualified Privilege, Appendix C4-5, Greenmoss' Opposition to Petition for Writ of Certiorari.) (Emphasis added) It characterized *Gertz* as setting forth a standard that was coterminous with the common law qualified privilege. D & B's Requests to Charge the Jury were utilized by the Trial Court in large measure. Curiously, the portion of the charge D & B highlights as objectionable is derived verbatim from its own jury requests. *Compare* J.A. 19 *with* Defendant's Request to Charge Jury paragraph 3.

Because of the nature of this case, the manner in which it was presented to the trial Court and the Vermont Supreme Court's construction of the charge as a whole, the charge in its totality must be considered. Greenmoss would point out, however, that the punitive damage instructions were not solely confined to a punitive damage award arising out of the mere fact of defamatory publication. (J.A. 20). The charge on punitive damages allowed the jury to consider, wholly apart from considerations of defamation, the conduct of D & B toward Greenmoss after the publication with a view toward whether D & B's actions justified the deterrence of exemplary damages. (J.A. 21).

D & B objected to the Court's instruction on compensatory damages to the extent that those instructions related to libel *per se,* apparently believing that the common law privilege was conclusively established factually. Significantly, and contrary to the implication in D & B's Brief at page 7, D & B did ***not*** raise objections to the Court's instruction on punitive damages on grounds related to the issues here. Rather, apparently content with the legal standard which the Court planned to instruct, D & B contended the facts did not meet the test and moved

to dismiss the punitive claim solely on grounds of factual inadequacy. (Tr. 468-69). D & B objected to that portion of the punitive damage instruction that permitted the jury to consider D & B's conduct both before and after the publication of the erroneous report in deciding whether it acted with actual malice so as to support an award of punitive damages. (Tr. 493-494). Although the issue of the common law qualified privilege is not before this Court, the manner in which the trial Court handled the question is important to a proper understanding of the position of D & B here. The trial Court repeatedly instructed the jury that the qualified privilege was an obstacle which Greenmoss would have to hurdle in order to hold D & B liable and to justify the award of any damages. Reading the charge as a whole, it was only after the jury determined that the qualified privilege was abused by malicious or reckless publication, that the question of *any* damages, compensatory or punitive, could be considered. Thus, the use of libel *per se* language in the charge is surplusage.[5]

The Vermont Supreme Court, in construing the charge, ruled that, although *Gertz* was not applicable, D & B was afforded a charge which satisfied the constitutional privilege outlined in *Gertz.* As the Vermont Supreme Court ruled, "in short, D & B has nothing to complain about, since it received [a] beneficial charge[s] to which it was not entitled." (J.A. 46).

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[5]The libel *per se* language was in the charge to cover the possibility that the jury would find that D & B did not establish it was a credit reporting agency and thus did not carry its burden of proof on the application of the common law privilege.

SUMMARY OF ARGUMENT

A. In attempting to extend *Gertz v. Robert Welch, Inc.* to non-media defendants in order to protect its credit reports, D & B misframes the issue. This case should be looked at as a commercial speech case. The issue is whether false and misleading statements of fact made by a commercial speaker in the course of its business should receive constitutional protection despite a state regulatory system that protects the target of such speech from false factual statements concerning the condition of its business. There is no difference between regulation of speech based on statute or administrative rule and regulation based on case precedent.

The speech involved here fits the classic mold of commercial speech. The speech is false and misleading and thus, can be severely restricted and even prohibited without running afoul of the First Amendment. The state did not prohibit the speech in this case and the restrictions placed upon it were not by way of prior restraint but rather focused on the subsequent financial responsibility of the speaker to the injured party. This is an appropriate position for a state to take in response to false commercial speech that damages its citizens. *Gertz* and *New York Times v. Sullivan* are inapplicable to such situations and should not be extended to cover them since to do so would depreciate and devitalize the First Amendment and the interests it protects particularly in defamation cases. If *Gertz* applies to this case, commercial speech will receive the full constitutional protection previously reserved for speech necessary about public issues and public debate. This speaker does not need the

breathing space allowed for false facts because there is no concomitant utilization of the type of speech which justifies giving leeway to falsehood. This speech has nothing to do with the political goals of the First Amendment nor of the criticism of government. It is not germane to arriving at a self-governing society. If *Gertz* applies, all lines between what is and what is not within the ambit of the First Amendment will be erased and commercial speech will ascend to the same status as *New York Times* speech. This Court's careful development of First Amendment doctrine in the area of commercial speech will be frustrated.

B. Even if D & B has focused on the right issue and the extension of *Gertz* in the non-media context should be discussed, D & B has used the wrong analysis to advance that proposition. *Gertz* itself does not apply to non-media defendants in language, holding, rationale or concept. Thus, the Court must extend *Gertz* to cover non-media defendants like D & B. There is no reason to do that and it would be bad policy. Non-media defendants are already constitutionally protected to the level of *New York Times* standards if they are sued for defamation by public officials or public figures. Thus, the only defamation area left open by the case progression from *New York Times* through *Gertz* is purely private defamation, i.e., suits by purely private plaintiffs against non-media defendants. The considerations which prompted this Court in bringing the First Amendment into defamation law should be carefully focused upon to see if they are relevant to purely private defamation. When so considered, the total lack of genuine First Amendment issues becomes evident where a defendant like D & B is involved.

If *Gertz* is extended to non-media defendants, the First Amendment standards mandated by *New York Times* will apply in every defamation case tried in this country. This headlong rush to symmetry will be the death knell of reputational interests of our citizenry, even in states like Vermont which constitutionally protect reputation. Because of the fabric of common law in most states, extension of *Gertz* to non-media defendants will give commercial credit rating agencies more protection than any speaker, including the press, with no corresponding increase in protecting the issues for which the Framers drafted the First Amendment. The present formula constitutionally protects enough speech that fosters First Amendment ideals. Extending *Gertz* to all non-media defendants will protect too much speech that has nothing to do with the First Amendment and provide protection to very little that does.

C. The absence of any involvement or implication of the press renders this private defamation case without relevant precedent in First Amendment methodology. D & B's exclusive reliance on the speech clause in the First Amendment is not enough to broaden *Gertz* beyond its holding since the press involvement was an indispensible component of the *Gertz* formula. If the Speech Clause protects the type of speech in this case, the Press Clause will be a redundant, functionless appendage. This is contrary to the intent of the Framers.

D. This case builds a constitutional mountain out of an argument advanced at trial as a secondary "make weight" to persuade the trial judge to apply a common law privilege to credit reporting agencies. D & B never gave the lower court the chance to independently consider

Gertz since it did not assert the First Amendment as an independent basis for protection. Thus, a case tried as a common law libel case is now sought to be the vehicle for one of the major constitutional issues of our jurisprudence. The issue raised by the Petition was not preserved and presented in a manner commensurate with a litigant's advocacy responsibility and is thus foreclosed.

ARGUMENT

I. DUN & BRADSTREET IS NOT ENTITLED TO THE FIRST AMENDMENT PROTECTIONS ESTABLISHED IN GERTZ V. ROBERT WELCH, INC.

A. The Statements Made By Dun & Bradstreet In This Case Which Gave Rise To Its Liability For Damages Are Erroneous And Misleading Statements Of Fact Made In Connection With A Commercial Transaction And Are Therefore Not Entitled To Constitutional Protection.

Greenmoss submits that the issue framed by the Petition is inadequate. Resolution of this case need not involve the extension of *Gertz* to a non-media defendant, even a non-media defendant like D & B. Similarly, the boundaries of any media/non-media distinction and the appropriateness of such a distinction need not be explored here. This case can be more properly decided by reference to constitutional standards involving commercial speech and commercial speakers. What makes this case particularly unsuited for discussion of the issue

framed by the Petition is the fact that D & B is not representative of the class of non-media speakers and, indeed, is a peculiar advocate to advance the cause of constitutional interests of non-media speakers. *The proper issue here is whether admittedly false and misleading commercial speech should receive constitutional protection against money damages awarded pursuant to a state regulatory scheme which stringently protects businesses from false and deceptive statements of fact about the condition of their business.* Greenmoss contends that the Constitution should not invade this area and, as to this Petitioner, traditional common law protections are entirely appropriate and adequate. The defamation here constituted trade libel under traditional notions since on its face it directly affected Greenmoss' business.

It must be precisely recognized the types of statements for which D & B attempts to obtain First Amendment protection. It is conceded by D & B that the defamatory statements it made about Greenmoss in reporting the bankruptcy were false and inaccurate statements of *fact.* They had no panache of opinion nor did they invite debate. What is before the Court are simply false and misleading statements of fact, made in a commercial milieu, which D & B admits were negligently and carelessly made. It is speech exclusively in the economic interest of the speaker (D & B) and its audience (D & B's private, paid-in-advance subscribers).

The reports in this case constitute commercial speech. They involve and are about business. The audience is not one of general demography. It is a limited, finite, selective, business audience that makes contracts in advance to obtain, on pre-arranged terms and conditions, reports to

assist it in evaluating commercial transactions. Indeed, this is the nature of the commercial transaction proposed by D & B. The information gathered does not relate to opinion nor does the audience expect that it will contain opinion. The reports are not, strictly speaking, in the economic interest of the speaker. The speech D & B seeks to protect does not even propose a commercial transaction. The speech here is the culmination or product of a previous proposal of a commercial transaction, a proposal which D & B's audience accepted because it needed veracity about a given subject. The speaker gets paid directly and *exclusively* by the audience to provide facts that are easy to verify. This remuneration is based on creating a large, elaborate system for collecting and verifying these facts. D & B is, as it contended at trial, the largest credit reporting agency in the world (Tr. 373). Because this speaker is in the marketplace of facts and not ideas, and in part because it has the opportunity to make contracts in advance with its audience, it is not faced with any dilemma of publishing or remaining silent and it can spread costs of doing business among its many subscribers.

The fact that Vermont has chosen to regulate this speaker by case precedent rather than by statute or regulation and regulates the speaker by financial responsibility rather than prior restraint is constitutionally irrelevant.

Gertz recognizes that there is "no Constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340. A false fact, carelessly and negligently made, is not an "essential part of any exposition of ideas and [is] of such slight social value as a step to the truth that any benefit that may be derived from them is clearly

outweighed by the social interest in order and morality." 418 U.S. at 340. *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976) (untruthful speech has never been protected for its own sake.) *Id.* at 772, n. 24.

In the instant case, totally unlike *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny, including *Gertz*, a commercial speaker seeks the protections which have heretofore been recognized by this Court solely in the context of media or press defamation or in actions involving public officials or public figures.

Bates v. State Bar of Arizona, 433 U.S. 350 (1977), validated a state regulatory system which fostered truthfulness where commercial speech was involved. The Court evidenced minimal concern that regulation to assure truthfulness in commercial speakers would discourage such speech and focused on the commercial speaker's knowledge of his product and his business interest in its dissemination. 483 U.S. at 383. Citing *Gertz*, the Court declared "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." *Id.*

Bates rejects the interest in spontaneity of commercial speech on reasoning particularly appropriate to the instant case. Commercial speech is generally "calculated" and thus "strict requirements for truthfulness" are appropriate. *Id.* at 383. Here, the product D & B sells is *accurate* data about the business of others. Its subscribers would have it no other way. They do not want to be stimulated by ideas and opinions from D & B. A spontaneous comment in such a report, if factually incorrect or misleading, could have untoward economic consequences for them. D & B's audience is not interested in D & B's freedom of expression or in its political statements. The audience wants veracity and D & B has responded to this need by building a broad based information gathering network which is oriented to the collection of facts.

Commercial speech occupies a lower place in the First Amendment heirarchy than non-commercial expression. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). *Ohralik* posits that the constitutional distinction between commercial expression and non-commercial expression rests on the idea that commercial expression is of less constitutional moment than other forms of speech. *Ohralik* retreated from even the limited protection of commercial speech granted in *Bates* and held that entire classes of commercial speech *necessarily including some harmless speech* could be prohibited where allowing the speech would be likely to result in some deception. 436 U.S. at 464-67. Justice Powell, writing for the Court, observed that the protections of *New York Times v. Sullivan* might not be needed for commercial speech, specifically comparing *New York Times* with *Dun & Bradstreet v. Grove*, 438 F. 2d 433 (3rd Cir.) *cert. denied*, 404 U.S. 898 (1971). The objectivity, hardiness, ease of verification and the speaker's knowledge of the product or service about which the speech is made all militated against the *Ohralik* Court's tolerance of false commercial speech merely to protect some speech that may have tangential First Amendment significance.

Dun & Bradstreet v. Grove, supra, holds that a private subscription credit report is "not a medium entitled

to the extended constitutional protection of the *New York Times* doctrine." Like *Grove,* most of the lower courts which have focused on the commercial nature of credit reports have analyzed those reports as a genre of commercial speech lying beyond the protection of the First Amendment. *Oberman v. Dun & Bradstreet,* 460 F. 2d 1381 (7th Cir. 1972); *Kansas Electric Supply Company v. Dun & Bradstreet,* 448 F. 2d 647 (10th Cir. 1971), *cert. denied* 405 U.S. 1026 (1972); *Millstone v. O'Hanlon Reports, Inc.,* 528 F. 2d 829 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.,* 482 F. 2d 25 (5th Cir. 1973), *cert. denied* 415 U.S. 985 (1974); *Wortham v. Dun & Bradstreet, Inc.,* 399 F. Supp. 633 (S.D. Tex. 1975) *aff'd.,* 537 F. 2d 1143 (5th Cir. 1976).[6] Professor Maurer concludes that the analysis used in these decisions parallels the contemporary pronouncements of this Court on the constitutional status of commercial speech. *See* Maurer, *Common Law Defamation and The Fair Credit Reporting Act,* 72 Georgetown L.J. 109 (1983).

Central Hudson Gas & Electric Corporation v. Public Service Commission, 447 U.S. 557 (1980), announced a balancing test for commercial speech to determine whether such speech, despite its depreciated constitutional status, is, nonetheless, entitled to some First Amendment protection. Whether protection is available for a particular commercial expression turns on the nature of the expression and the government interest served by its regulation. This test was further explained in *Metromedia, Inc. v.*

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[6]It should be noted that many of the cases cited herein rely, *in part,* upon the now rejected public interest analysis utilized in *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971).

City of San Diego, 453 U.S. 490 (1981). The court explained *Central Hudson* as having

> adopted a four part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) the First Amendment protects commercial speech *only* if that speech concerns lawful activity *and is not misleading.* A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective.

453 U.S. at 507 (citations omitted) (emphasis added).

In applying those rules to this case, Greenmoss submits that one need go no further than the first step of the analysis. *Central Hudson* and *Metromedia* posit that if commercial speech is to receive any protection under the First Amendment, the speech must not be misleading. The bankruptcy notice published by D & B in this case, far worse than being misleading, was totally and completely false, not merely as to the fact of the bankruptcy, but also as to the level of Greenmoss' assets and liabilities. D & B's further commercial statements in this case, undertaken after the false report of bankruptcy, are an unattractive combination of both false and misleading statements.

Consequently, the speech sought to be protected here does not satisfy the threshhold test to obtain even the minimal degree of protection provided to commercial speech by the First Amendment. Therefore, the state of Vermont, by its case precedent, had the power to stringently regulate and even exclude such speech. The state, of course, did neither since the trial Court made the com-

mon law privilege an obstacle to recovery of any damages whatsoever. Even assuming, for the purpose of argument, that the jury instructions permitted *per se* damages without any showing of fault,[7] which Greenmoss vigorously contests, and further assuming that such an instruction can be said to exclude speech, the *Central Hudson* test permits such treatment of this speech. Of course, Vermont did not exclude or restrain D & B's speech in advance, but rather, required that D & B be financially responsible for the reputational damage to Greenmoss.

One need not advance to the remaining three criteria of *Central Hudson* if the speech sought to be regulated is misleading. Under *Central Hudson,* if the speech misleads, it can be *severely* regulated or prohibited entirely. However, application of those criteria to this case reveals interesting dimensions.

The government interest in protecting its citizens' reputational rights is a substantial interest, as this Court recognized in *Gertz.* Such considerations apply with even greater force here since reputation has constitutional protection and recognition in Vermont. The Vermont Constitution provides that:

> Every person within this state ought to find a certain remedy, by having recourse to the laws, for *all injuries or wrongs which he may receive in his* person, property, or *character* . . . . Vermont Constitution, Chapter 1, Article 4th. (Emphasis added.)

That the framers of the Vermont Constitution believed personal reputation to be of such importance to insert it

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[7]As Greenmoss points out in this brief, libel *per se,* as used in the jury charge, gave Greenmoss nothing and did not prejudice D & B.

in the Vermont Constitution is definitive evidence of the substantial nature of the governmental interest in the protection of reputations in Vermont.

The assessment of compensatory and punitive damages under the instructions given by the trial court directly enhance the governmental interest in protecting reputation and guarding its citizens against persistent, insulting, oppressive conduct in that there is a deterrent effect, long recognized in the Vermont cases, in assessing punitive damages. It is quite significant that the jury instructions permitted consideration of D & B's conduct both before and after the publication of the erroneous report. This gave the jury the opportunity to gauge the nature of D & B's actions *independently* of the mere fact of a single defamatory publication. In other words, Vermont and other states have a strong interest in deterring repeated, harassing and persistent conduct taken against their citizens. The trial Court's instructions, which permitted the jury to assess the propriety of that conduct and the consequences for engaging in it, directly advanced the state's interest in deterrence totally apart from issues of publication of defamation which is the only issue triggering First Amendment concerns here.

The instructions on mitigation of damages focused upon the jury's discretion whether to award any punitive damages at all and if so, the amount of the award. The mitigation instructions, which were quite extensive, allowed punitive damages to reach no farther than necessary to accomplish the state's objectives. *cf. Central Hudson, supra.* Moreover, the mitigation instructions placed two limitations on any allegedly unlimited discretion given to juries in the punitive damage area. The first was that

any action undertaken by D & E to mitigate Greenmoss' damages was to be considered by the jury on the threshhold question of whether or not to award any damages of a punitive nature. The second limiting instruction was that if the jury found that D & B attempted to mitigate damages, any punitive damage award must be accordingly lessened.

In view of the foregoing, the test for granting commercial speech any First Amendment protection advanced in *Central Hudson* is not satisfied. Thus, D & B's commercial speech should not receive any First Amendment protection.

Additionally, contrary to the apparent assumption made by D & B, the jury instructions on punitive damages embraced and encompassed common law notions of exemplary damages for actions of D & B which were extrinsic from and unrelated to the publication of the defamation. Those instructions were not limited solely to consideration of D & B's publication of a defamatory statement but brought into play other conduct of D & B violative of Greenmoss' rights.

Even if credit reports fall within the realm of protected commercial speech, it does not necessarily follow that credit reporting agencies will be afforded the full protection of *Gertz* and *New York Times* because commercial speech, under settled doctrines, is accorded less protection than other constitutionally guaranteed speech. *See* Maurer, *supra,* at 110.

As Professor Shiffrin, a noted commentator on the First Amendment points out, "prohibitions of false or misleading speech are always permitted." *See* Shiffrin,

The First Amendment and Economic Regulations: Away From a General Theory of the First Amendment, 73 Northwestern L. J., Volume 5, at Page — (1984).[8] (Hereinafter Shiffrin, *The First Amendment*).

Gertz instructs that erroneous statements of fact receive protection only because they are inevitable in the context of *free debate* to protect the type of speech which is important to First Amendment liberties. False factual reports about a business filing for bankruptcy do not invite free debate. D & B's audience would be radically diminished if it were advised that D & B needed "breathing space" to commit error to satisfy its own self-expression. D & B wants breathing space to obtain financial protection against errors, not so that it can contribute to robust debate on First Amendment issues. Thus, as will be discussed *infra,* there are no protected First Amendment interests which this Court has acknowledged in the area of defamation that can be advanced to support a claim that the Constitution should protect these concededly false facts. The defamation in this case had nothing to do with public issues, political self-government, ideas, self-expression, discovery of truth or exposition of opinion. Note, *Constitutional Protection of Commercial Speech,* 82 Columbia L. Rev. 720, 731 (1982). These reports relate to assets, liabilities, bank accounts, identification of officers and principals and other easily verifiable facts. They do not propose a commercial transaction in themselves. They

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[8]Professor Shiffrin's comprehensive comments on commercial speech were presented at a symposium at Northwestern University Law School. The presentation is to be published in the forthcoming volume (No. 5) of the Northwestern University Law Journal. When published, Greenmoss will provide appropriate page citations.

are not, strictly speaking, statements in the economic interest of the speaker, although the speaker does derive economic profit from their circulation.

In *Ohralik,* the Court worried that "the failure to distinguish between commercial and non-commercial speech could invite dilution of non-commercial speech simply by a leveling process of the force of the First Amendment protections with respect to non-commercial speech." 436 U.S. at 456. Mr. Justice Rehnquist, dissenting in *Bates,* observed that invoking the First Amendment to protect advertising of goods and services, however truthful or reasonable, would "demean" the First Amendment. The speech clause was intended as a "sanctuary for expressions of public importance or intellectual interest." 433 U.S. at 404. Because D & B does not frame the issue in this case correctly, it fails to perceive that extending *Gertz* to this type of commercial speech will effect precisely such a degradation of the First Amendment.

A ruling that the *Gertz* protections do not apply to commercial credit reporting agencies will not send the nation's trial Courts off on an *ad hoc* journey into often abstract line drawing. Thus, the mischief for which this Court in *Gertz* criticized the decision in *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971), will not occur. In *Gertz,* the Court was concerned that the *Rosenbloom* "general or public interest" test and its "information relevant to self-government" tests would force judges into deciding on an *ad hoc* basis which publications qualify for First Amendment Protections and which do not. *See* 418 U.S. at 346. As Professor Shiffrin cogently points out, "drawing lines based on underlying First Amendment values is a far cry from sending out the judiciary on a general *ad hoc*

expedition to separate matters of general or public interests from matters that are not. A commitment to segregate certain commercial speech from *Gertz* protection is not a commitment to general *ad hoc* determinations. The costs of uncertainty in the line drawing process are outweighed by respect for state interests and unnecessary trivialization of First Amendment concerns." Shiffrin, *First Amendment, supra,* at —. The line to be drawn here is simple and straightforward. If it is not drawn to exclude this Petitioner, the absolutist's view of the First Amendment will finally prevail and over-the-fence gossip, no matter how injurious to a private individual's reputation, will be within the coverage of the First Amendment. The failure to draw lines would totally upset the balancing approach which this Court is committed to in weighing the competing interests at stake between an individual's reputational rights, particularly when they are recognized in the state constitution, and First Amendment protections.

One final aspect of analyzing this case in terms of commercial speech is that the state's power to regulate the type of commercial conduct that it deems permissible can be analyzed in terms of the cost of doing business in that particular state. *The extension of Gertz suggested by D & B would, of course, eradicate all state's common laws of libel per se, for all plaintiffs against all defendants.* In those states, like Vermont, which choose not to extend protection to erroneous commercial statements of fact, the cost of doing business for a company like D & B may or may not be higher than in states which protect such business. The evidence is, of course, inconclusive. However, it was never the purpose of the First Amendment

to allow businesses to operate in all states at the same cost. Vermont should remain free to decide for itself whether or not, consistent with the tests announced in *Central Hudson Gas & Electric* and *Metromedia v. City of San Diego,* this form of commercial speech should be protected.

For the above reasons, Greenmoss submits that this case should be analyzed on a commercial speech basis and, when so analyzed, the protections in *Gertz* should not be extended to commercial credit reporting businesses.

F Gertz v. Robert Welch, Inc. Should Not Be Extended To Protect This Non-Media Petitioner.

Although D & B repeatedly seeks to create the impression that the Vermont Supreme Court ignored the holdings in *Gertz* and, acting on its own, drew a distinction between media and non-media defendants, such implication ignores reality. The Vermont Supreme Court is not the progenitor of the distinction between media and non-media defendants. Justice Powell's carefully worded opinion in *Gertz* is patently limited only to cases in which there is a media defendant. *Gertz v. Robert Welch, Inc.,* 418 U.S. at 347, Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non-Media Defendants,* 95 Harv. L. Rev. 1876, 1877 (1982).

There is no ambiguity in *Gertz.* The decision does not textually or methodologically apply to defamation by a non-media defendant. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1417 (1975); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment,* 26 Hastings L.J. 777, 792-793 (1975).

Any doubt that *Gertz's* holding is limited solely to media defendants is dispelled by subsequent observations of this Court. *Babbit v. United Farm Workers National Union,* 442 U.S. 289, 309 (1979); *Hutchinson v. Proxmire,* 443 U.S. 111, 113 n. 16 (1979). The context of the statements in *Babbit* and *Hutchinson* about *Gertz's* limits makes it clear that the Court in each case was referring to suits by private plaintiffs against non-media defendants especially since the application of the First Amendment in suits by public officials and public figures against non-media defendants has already been resolved. Thus, D & B's attempt to establish the affirmative out of a negative, i.e., the omission of a specific exclusion of non-media defendants as a ruling that non-media defendants are covered by *Gertz,* fails to appreciate the sophistication of the *Gertz* opinion. The fundamental methodology of *Gertz* adopts a balancing test which recognizes that accommodations must be struck between the interests that states have in protecting *private* individuals from defamation and the values the First Amendment protects when the media is involved in defamation suits as those values have been identified by this Court in *New York Times* and its progeny. Vermont has strong interests in protecting private individuals from defamation. This is not only a settled doctrine in Vermont case law, *Darling v. Clement,* 69 Vt. 292, 37 A. 779 (1897); but, far more significantly, has constitutional recognition. Vermont Constitution, Chapter 1, Article 4th. *Gertz* does not rely upon any state constitutional provision for its acknowledgement that private individuals should be compensated for wrongful injury to reputation, 418 U.S. at 348.

Faced with an *a fortiori* case for vindicating personal reputation, the question for consideration here is what First Amendment values can D & B legitimately identify, *especially in the context of this Court's decided cases on defamation and the First Amendment, that make down-weight against the strong state interest in reputational protection acknowledged in Gertz and enhanced by the Vermont Constitution*? Greenmoss submits that there are no First Amendment values which would justify the extension of *Gertz's* protection to this Petitioner.

In its effort to find some interest protected by the First Amendment, D & B draws on cases which have nothing to do with defamation. Its difficulty in identifying a relevant First Amendment concern highlights the inappropriate framing of the issue raised by the Petition. "Each medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Metromedia v. City of San Diego,* 453 U.S. 490, 501, n. 8 (1981).

After a probing analysis of First Amendment precedent, Professor Shiffrin concludes that the structure of First Amendment doctrine varies depending on the context and issue before the Court. "The assumption of general balancing", posits Professor Shiffrin "is that the values of speech interact with other values in such complicated ways that the Court may need discrete doctrinal tools to resolve particular problems." Shiffrin, *The First Amendment, supra,* at ——.

Empty abstractions about the First Amendment, such as those asserted by D & B, have no meaningful role in the utilization of the balancing process. "To make a balancing approach meaningful, we must think in narrower terms, recognizing that the strengths of the competing interests may vary in new contexts." Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small,* 13 U.C.L.A. L. Rev. 1 (1965), cited in Shiffrin, *Id.* at ——.

Accordingly, to properly analyze the issue asserted by Petitioner, it is necessary to identify the doctrinal foundations of the First Amendment, not as vague, elusive concepts and potential panaceas for all ills, but as a source of the real tension created between those foundations and the law of defamation.

New York Times v. Sullivan emanates from a "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust and wide open. 376 U.S. 254, at 270. (emphasis added). In the oft-maligned phrase which has caused so much contradictory scholarship, the Court observed that the "central meaning" of the First Amendment renders prosecutions for libel on government abhorrent to the American system of jurisprudence. *Id.* at 291-92. The rationale of *New York Times* is rooted in a fundamental respect for the right of the people to criticize the *government.* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology,* 25 U.C.L.A. L. Rev. 915, 922 (1978). (Hereinafter Shiffrin, *Non-Media Speech*).

D & B surprisingly contends that unless *Gertz* is extended beyond media speakers, other speakers would be subject to unlimited exposure for defamation, even where no actual malice existed. D & B Brief at 17. This contention is incorrect and ignores the fact that the logic of

New York Times compels its application to defamation of public officials and public figures by non-media defendants. *See* Eaton, *supra*, at 1406. Predictably, the cases have so held. *Henry v. Collins,* 380 U.S. 356 (1965); *St. Amant v. Thompson,* 390 U.S. 356 (1968). Therefore, the liability of non-media speakers is not unlimited; non-media defendants receive the same protections in suits brought against them by public officials and public figures as do media defendants. Thus, the issue in this case is much narrower than D & B would have the Court believe. It is only where a private plaintiff is involved that the *New York Times* protections would not be available to a non-media defendant.

The crucial elements which bring the First Amendment into conflict with defamation law are missing where the plaintiff is not a public official or public figure and there is no media defendant. First, there is no threat to the free and robust debate on public issues. D & B does not contend that its defamatory statements have anything to do with free and robust debate on public issues. Secondly, there is no potential interference with the meaningful dialogue of ideas concerning self-government. Again D & B does not argue that its speech has anything to do with self-government. Third, in defamation law, the threat of liability causing a reaction of self-censorship, at least when the press is involved, causes First Amendment tension. *Gertz,* 418 U.S. at 350. D & B does not contend that it fears self-censorship if *Gertz* protections are not provided. It is certainly not obvious that self-censorship will occur with a huge commercial enterprise such as D & B. Indeed, it has been suggested that self-censorship is not a real threat in the case of a credit reporting agency. *Hood*

v. Dun & Bradstreet, supra; Note, *Libel and Self-Censorship,* 53 Tex. L. Rev. 422, 442-43 n. 96 (1975). Since these reports deal with fact and not opinion, veracity, which is the reason credit reporting businesses prosper, achieves the mutual goals of immunizing against liability and creating the financial security to vigorously respond to contested claims.

From the standpoint of policy, the decision not to extend *Gertz* to non-media defendants should not really be a troublesome matter since in most non-media cases, particularly those which involve credit reporting agencies, common law privileges are usually applicable. In fact, extending *Gertz* to a non-media commercial credit rating agency will have the paradoxical result of providing such a defendant with even more protection than is afforded to the media.[9]

A major difference between media and non-media speakers is that the restrictive nature of the publication by a non-media speaker, even though perhaps broadly disseminated, denies, in large part, any possible means of reply in the medium which caused the defamation. Some access to the defaming medium for reply and rebuttal was assumed to be available to the defamed individual by the Court in *Gertz.* 418 U.S. at 344. Although rebuttal may

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[9]For example, *compare Gobin v. Globe Publishing Company,* 216 Kan. 223, 531 P. 2d 76 (Kan. 1975) (negligence required to award any compensatory damages in litigation involving private plaintiff and media defendant) *with Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.,* 448 F.2d 647 (10th Cir. 1971) *cert. denied,* 405 U.S. 1026 (1972) (applying Kansas Law) (Plaintiff must prove wanton and reckless conduct to recover any compensatory damages against commercial credit reporting agency).

be inadequate, it is certainly not irrelevant. 418 U.S. 344 at n. 9. In this case, the very nature of the credit reporting medium admits of no access for any realistic opportunity to counteract false statements of fact. Indeed, Greenmoss' efforts at access to the D & B medium as a self-help remedy were refused. In addition to lack of access to the non-media speaker's medium to effect the remedy of self-help, the identification of a credit reporting agency as the source of defamatory publications may never be exposed and its proximate causation difficult to pinpoint but the damage is inflicted nonetheless. The *Grove v. Dun & Bradstreet* court referred to these considerations as the "pernicious" effects of non-media defamation. 438 F. 2d at 437. Compare this with the immediacy of awareness of publication where media defendants are involved.

If *Gertz* is extended to non-media speech, the result will be to protect much speech having nothing to do with public issues while safeguarding relatively little that does. Consistent with the focus of this Court in First Amendment defamation cases, it is appropriate that some public speech go unprotected lest too much non-public speech be unnecessarily safeguarded. *See* Shiffrin, *Non-Media Speech, supra* at 929-930.

Because defamatory non-media speech has been constitutionalized to the extent that it involves public figures and public persons, there is consistency to the *New York Times/Gertz* formulation that debate on public issues be sufficiently robust and wide open for First Amendment purposes. This construction validates the commitment to a politically based interpretation of the First Amendment

in defamation cases and does not afford unnecessary protection to speech not relevant to public issues. Shiffrin, *Id. See also,* Eaton, *supra* at 1408.[10]

D & B's contention that the *Gertz* standard should be extended to it to "avoid punishing the free flow of information" is both inapposite and ironic. The cases cited in support of that proposition simply have nothing to do with the tension between the First Amendment and defamation. The irony is that D & B's publications are very limited access publications which are inimical to providing information on a general basis. Their stated purpose is contrary to both the *New York Times'* rationale of free and uninhibited debate on public issues and the facilitation of the free flow of information since their use is conditioned upon maintaining confidentiality.

D & B also advances the spectre that a failure to extend *Gertz* to non-media defendants will force judges into difficult *ad hoc* rulings. Once again, D & B advances a cause which is not its own. D & B has never contended that it is a media defendant and there is a "common sense distinction" between the commercial speech involved here and other varieties of speech. *Central Hudson Gas & Electric,* 447 U.S. at 562. This attempt at eradicating all line drawing is a subterfuge for asking this Court to abandon the balancing methodology utilized in First Amend-

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[10]In this context, D & B's reliance upon *Henry v. Collins,* 380 U.S. 356 (1965) is misplaced since the plaintiffs in *Henry v. Collins* were public officials. Additionally, several of the communications which the Court held were entitled to *New York Times* protections in *Collins* were telephone statements to reporters for publication which followed in newspapers. *See Henry v. Collins,* 253 Miss. 34, 42-44, 158 So. 2d 28, 30-31 (1963).

ment defamation cases. The line drawing to be done has boundaries measured by First Amendment/defamation considerations already decided by this Court. Secondly, D & B's suggestion shows minimal confidence in judges, who draw lines *within recognized parameters* every day.

The media/non-media distinction, frets D & B, is a device for protecting political messages and is thus content regulation in disguise. D & B's unstated assumption is that content regulation is always constitutionally prohibited. This is not so. *Young v. American Mini Theaters*, 427 U.S. 50, 66-70 (1976) (the question whether speech is or is not protected by the First Amendment "often" depends on its content). Focusing on content is particularly appropriate with commercial speech. *Bates v. State Bar of Arizona, supra* at 463 (commercial speech "must" be distinguished by its content). Moreover, even if some content is regulated by the media/non-media dichotomy, this is appropriate policy in defamation litigation, drawing upon the fundamental predicates of *New York Times* which is based upon protecting political messages and fostering debate on public issues. *New York Times* advances a politically based interpretation of the First Amendment. Shiffrin, *Non-Media Speech, supra* at 923-24. *By protecting public figures, public officials and media defendants, the goal of fostering debate on public issues should be sufficiently robust and wide open for First Amendment purposes without extending it to non-media defendants.*

It is not necessary in this case to decide whether *Gertz* should be extended to all non-media defendants. It need only be decided whether non-media defendants such as

D & B should be extended the protections of *Gertz*. Greenmoss submits that *Gertz* should not be extended. Its limitation to the media is intentional, workable and rational and provides a legitimate demarcation point for protecting First Amendment interests. To hold otherwise would unwisely and unnecessarily adjust the balance between the First Amendment and reputational protection.

C. The Rules Fashioned In Gertz Should Not Be Extended In This Case Since The Press Or Media Is Not A Party And There Are No Overtones Of Press Involvement.

This Court has never decided a defamation case involving a purely private plaintiff and a non-media defendant who has no connection with the press or in which there are no press overtones. Eaton, *supra,* at 1404 n. 228.

The commentary by Mr. Justice Stewart and the opinion in *Gertz* intimate that *New York Times* may be primarily a free press case. Mr. Justice Stewart, *Or of the Press,* 26 Hastings L.J. 631 (1975); Shiffrin, *Non-Media Speech, supra,* at 916, 923-24. Mr. Justice Stewart concludes that "The Court has never suggested that the constitutional right of free speech gives an *individual any* immunity from liability for either libel or slander. *Id.* at 635. *See also, Monitor Patriot v. Roy,* 401 U.S. 265, 270 (1971) "the role of *New York Times* was based on a recognition that the First Amendment guarantee of a free press is inevitably in tension with state libel laws."

Mr. Justice Stewart stresses that this Court's libel cases *are decided in the context of the guarantee of freedom of the press.* Freedom of the press is a structural provision of the Constitution and, in contrast to the pro-

tection of other liberties, protects an institution. Stewart, *supra,* at 633-35. When the element of freedom of the press is absent, the private reputational interests of a plaintiff like Greenmoss make downweight against the constitutional interests. Thus, absent the involvement of the press, the *New York Times/Gertz* doctrines should not apply. Stated otherwise, the balancing test utilized in *Gertz* cannot simply be transferred *in toto* to this case since the balance is entirely upset when there is absent from the equation a media defendant or media involvement.

Recently, the Court has focused upon the explicit guarantee of freedom of the press and its importance to the Framers of the Constitution. *Minneapolis Star v. Minnesota Commission of Revenue,* — U.S. —, 103 S. Ct. 1365 (1983). The renewed interest in the importance of the press clause, Justice Stewart's comments and a brilliant historical analysis of the press clause by Professor Anderson prompt a careful examination of whether involvement of the press is a significant Constitutional factor *in the area of defamation.*

"The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." *First National Bank v. Bellotti,* 435 U.S. 765 at 798 (1978) (Burger, J. concurring). Profesor Anderson's scholarly work is particularly noteworthy on the question of the primacy of the Press Clause. Anderson, *The Origins of the Press Clause,* 30 U.C.L.A. L. Rev. 455 (1983). To the Framers, the Press Clause was primary and the Speech Clause was secondary. *Id.* at 487. Since the press was expected by the Framers to be the primary source of

restraint against government power, and speech was an afterthought as a means of checking government power, the theory of *New York Times* and *Gertz* and the limitation in *Gertz* to media defendants have strong historical foundation.

The historical antecedents of the importance of the press demonstrate that freedom of speech and freedom of the press are not interchangeable, that they are not a constitutional redundancy and most significantly, that removing the press from the equation in First Amendment defamation litigation eviscerates such a significant portion of the *New York Times/Gertz* formula that individual reputational rights assume dominance over the interests of those who do not claim to be members of the press.

II. DUN & BRADSTREET DID NOT PRESERVE AT THE TRIAL COURT LEVEL THE ISSUE PRESENTED BY THIS PETITION AND ITS CONSIDERATION IS THEREFORE FORECLOSED.

Prior to the jury's decision, D & B did not assert *Gertz* as an independent basis for protection. It was solely and exclusively in the context of the common law privilege that D & B suggested the First and Fourteenth Amendment and *Gertz* had *any* application to this trial. Significantly, D & B never asserted at the trial Court level that it was entitled to *both* the protection of *Gertz and* the protection of the common law privilege; it characterized *Gertz* as setting forth a standard that was equivalent to common law privilege and as a "second rationale" for applying the privilege. Accordingly, this case was presented to the trial court and was tried as a common law libel case

with the claim of a qualified defamation privilege of a credit reporting agency as a crucial defense. From all that appeared at trial, there were no overtones of any independent First Amendment protection. Once the trial Court acknowledged that a qualified common law privilege was to be charged, which was an open question in Vermont, D & B was satisfied that it had sufficient protection. D & B gave the trial Court no opportunity to apply *Gertz* as an independent basis for protection. In the objections to the charge, both before and after its delivery, there was no mention of the doctrines advanced in *Gertz*.

Because D & B never put the trial Court on notice that it claimed a separate basis for absolution from liability grounded on the First and Fourteenth Amendments, the issue presented by this Petition is foreclosed.

Litigants have an obligation to adhere to the theories pursued at the trial Court level and theories not pursued there ordinarily will not be entertained on appeal. *Youakim v. Miller,* 425 U.S. 231 (1976). Questions that are not properly raised and preserved during trial proceedings are normally considered waived and parties cannot assign as error trial court's failures to give instructions which were not requested. *Bissett v. Ply-gem,* 533 F. 2d 142 (5th Cir., 1976).

Reference must be had to state law to determine if waiver or failure to preserve exists. *U.S. ex rel. Maxey v. Norris,* 591 F. 2d 386, *cert. denied,* 444 U.S. 912 (1978). Under Vermont law, where constitutional issues are raised on appeal that are not raised below and there appears to be no glaring error, they are foreclosed from consideration. *State v. Prue,* 138 Vt. 331, 415 A. 2d 234 (1980);

State v. Patnaude, 140 Vt. 361, 430 A. 2d 402 (1981). The constitutional issue asserted here does not rise to the level of the "glaring error test" which forgives a party from its advocacy responsibility. *State v. Stockwell,* 142 Vt. 232, 453 A. 2d 1120 (1982); *State v. Towne,* 142 Vt. 241, 453 A. 2d 1133 (1982). The test is whether the trial court has been so alerted to the claimed defense that it had a fair opportunity to gauge its application and utilize it if appropriate. *Scanlin v. Hopkins,* 128 Vt. 626, 270 A. 2d 352 (1970); *Dodge v. McArthur,* 126 Vt. 81, 223 A. 2d 453 (1966).

Since D & B never requested instructions for compensatory and punitive damages based on *Gertz,* it is too late in the day to contend for such protection. This omission is particularly crucial on the punitive damage issue. Support for the proposition that the *Gertz* doctrines were not an independent defense asserted by D & B at trial is that it never offered the trial court any suggestion whatsoever as to how to formulate jury instructions based on both the *Gertz* standards and the common law privilege. This would have been, of course, a formidable task.

III. THE CLAIMS MADE BY DUN & BRADSTREET ARE INCONSISTENT WITH THE TRIAL COURT'S INSTRUCTIONS ON DAMAGES

Implicit in D & B's arguments are the claims that liability for actual or compensatory damage was imposed without fault and that punitive damages were assessed solely and exclusively because of the publication of the defamatory report of Greenmoss' bankruptcy. Both of these assumptions are erroneous.

Any fair reading of the charge demonstrates that it clearly and specifically negated any opportunity of Greenmoss to receive damages out of any presumption under the defamation *per se* doctrines. The references to libel *per se* acknowledge that the jury had some liberty, however slight, to decide that D & B was not a commercial credit rating agency. D & B has never claimed the jury did not make such a conclusion nor could it. Ironically, the aspect of the charge that D & B seems to take the strongest exception to is taken verbatim from D & B's third Request to Charge the Jury.

Instructions must be interpreted and construed as a whole. *Curtis Publishing v. Butts,* 388 U.S. 130 (1967). Construing this charge as a whole and specifically considering the findings of the jury, liability was not assessed without fault and the trial court's commentary on the doctrines of libel *per se* had no operative effect.

To the extent that D & B contends it was assessed damages without proof of fault, the standards that Greenmoss had to prove to obtain a compensatory damage verdict were far more restrictive than that assumed to be required by *Gertz.*

On the issue of punitive damages, D & B makes the erroneous assumption that the jury's punitive damage award was issued because it published a defamatory statement. The trial Court's instructions were not so limited, nor was the evidence. The Vermont Supreme Court concluded that "there was ample evidence in the record to enable the jury to conclude that Defendant's conduct was insulting, reckless, and in total disregard of the Plaintiff's rights." (J.A. 45). The Court made no mention of

just the defamation and directed its attention to the cavalier attitude of D & B in its treatment of Greenmoss after the bankruptcy notice. (J.A. 34-36).

In short, D & B apparently would have this Court rule that once *Gertz* applies to a defamation case, other conduct of a defendant *totally apart from its publication* is immunized from traditional common law punitive damage considerations. Stated otherwise, D & B attempts to erect a shield against reckless, oppressive, harassing and outrageous acts merely because at some point in its relationship with Greenmoss, it engaged in publication. Such a contention is well beyond any theory recognized by this Court in First Amendment defamation litigation.

The trial Court's instructions were not limited to the publication of the false report of bankruptcy and this case does not simply involve the publication of a defamatory statement. It involves a defendant who, in addition to defaming, persistently and oppressively treated the Plaintiff well after the defamation. This conduct falls within the realm of traditional common law protection, not within the scope of the *New York Times/Gertz* philosophy. [11]

The Vermont Supreme Court concluded that the constitutional privilege outlined in Gertz was afforded to D & B. This ruling constitutes a legal interpretation by the state's highest court on the impact and legal effect of the instructions when taken as a whole. Therefore, the initial consideration in this case does not involve a

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[11] D & B does not contend that all punitive damage awards are constitutionally proscribed.

constitutional question but, rather, whether the Vermont Supreme Court correctly concluded as a matter of fact and state law that the trial Court's charge included the *Gertz* requirements. To reach the questions urged by D & B, this Court must first resolve against the Vermont Supreme Court and in favor of D & B, a factual question and a mixed question of fact and law as to the appropriate ness of that Court's interpretation concerning a jury charge delivered by one of its trial courts. *Smith v. Wade*, — U.S. —, 103 S. Ct. 1625 (1983), elucidates the point that jury instructions need not be compartmentalized on the question of punitive damages when the same standard for awarding punitive damages is an operative component of or is encompassed in the standards necessary for obtaining compensatory damages.

In this case, since negligence abundantly exists and is admitted by D & B, "fault", required by *Gertz* as a precondition to the recovery of actual damages, is present. The high standard Greenmoss had to meet merely to obtain compensatory damages incorporates and encompasses the *Gertz* standard mandated for punitive damages. D & B fails to demonstrate how the application of *Gertz* to this case would benefit it. Accordingly, the result of the Vermont Supreme Court should be affirmed irrespective of this Court's decision on the extension of *Gertz*.

CONCLUSION

Based upon the foregoing, Respondent, Greenmoss Builders, Inc., respectfully urges the Court to affirm the judgment of the Vermont Supreme Court.

Respectfully submitted,

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